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SAFETY-KLEEN SYSTEMS, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STEVEN WAMBOLDT, on behalf of himself, those similarly situated and on behalf of the general public, Plaintiff, v. SAFETY-KLEEN SYSTEMS, INC., a Wisconsin corporation, and DOES 1 through 100, inclusive. Defendant.	Case No. CV 07 00884 PJH **SAFETY-KLEEN'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** Date: August 8, 2007 Time: 9:00 A.M.

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PLEASE TAKE NOTICE that, on August 8, 2007, 2007, at 9:00 a.m., or as soon thereafter as the matter may be heard, defendant Safety-Kleen will move for summary judgment or, in the alternative, partial summary judgment against plaintiff Steven Wamboldt. This motion is brought in accordance with the Court's Minute Order, filed April 5, 2007, and the Court's Stipulated Order, filed April 17, 2007.

I. STATEMENT OF ISSUES

Defendant Safety-Kleen moves for summary judgment or, in the alternative, partial summary judgment against plaintiff Steven Wamboldt. Wamboldt was employed by Safety-Kleen as a Customer Service Representative ("CSR").[1] Wamboldt's First Amended Complaint includes two independent claims:

- That Safety-Kleen unlawfully failed to pay him premium pay for overtime work as required by California Labor Code § 510.[2] FAC ¶¶ 10, 27-28.
- That Safety-Kleen unlawfully reduced his sales commissions by the overall "profitability" of the branch in which he worked, FAC ¶ 10, or for failure of the branch to meet branch "revenue goals." FAC ¶ 12. *See also* ¶ 27.

The complaint also includes three dependent or derivative claims, meaning they depend on Wamboldt successfully establishing one or the other of his first two claims. Wamboldt claims that, by failing to pay him all wages due, i.e., overtime and commissions, Safety-Kleen also violated –

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[1] The title has been changed to Sales and Service Representative ("SSR") without a change in duties. The terms may be used interchangeably.

[2] Labor Code § 510(a):

> "Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee."

- California Labor Code § 202,[3] which requires an employer to pay all wages due within 72 hours of an employee's quitting. Complaint ¶¶ 13, 26.
- The Unfair Competition Law ("UCL"), California Bus. & Prof. Code §§ 17200 et seq., FAC ¶¶'s 33-41, which provides for relief in the form of restitution from a person who has engaged in an unlawful business practice. Unlawfully withholding wages is an unlawful business practice. An order for payment of such wages is a restitutionary remedy under the UCL. *Cortez v. Purolator Air Filtration Products Co.*, 32 Cal.4th 163 (2000).
- The California Labor Code Private Attorneys General Act of 2004 ("PAGA"), Labor Code §§ 2698 *et seq.*, FAC ¶¶ 7, 30, which provides for judicial enforcement by an aggrieved employee of civil penalties that could otherwise only be assessed and collected by the California Labor and Workforce Development Agency. Labor Code § 2699(a). PAGA also authorizes civil penalties for violation of provisions of the Labor Code that otherwise lack civil penalties, section 2699(f), and for judicial enforcement by an aggrieved employee of those new civil penalties, section 2699(g). The FAC fails to identify a provision of the Labor Code that fits within either of PAGA's two branches. At a minimum, there must be a violation of some provision of the Labor Code. Plaintiff has alleged only one: a violation of the Labor Code's overtime provisions. Plaintiff's commission claim is based on an alleged violation of a provision of an Industrial Welfare Commission Order, which is not a part of the Labor Code.

Safety-Kleen moves for summary judgment against Wamboldt. Safety-Kleen contends that California's overtime requirements are "not applicable" to Safety-Kleen's CSR's, including Wamboldt, pursuant to section 3(K)(2) of California Industrial Welfare Commission Order No.

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[3] Labor Code § 202:

> "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

7-2001.[4] Within the meaning of section 3(K)(2), Safety-Kleen's CSR's are drivers whose hours of service are regulated by Title 13 of the California Code of Regulations ("CCR") §§ 1200 *et seq.* Safety-Kleen also contends that it used branch revenue, not profitability, in calculating CSR commission compensation and that nothing under California law prohibits that practice. Once Wamboldt's overtime and commission claims fail, then so too his waiting-time, Unfair Competition Law, and Labor Code Private Attorneys General claims, because they depend on the court's concluding that one or both of his first two claims was valid.

II. MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S OVERTIME CLAIM

A. FACTS[5]

Safety-Kleen is a provider of parts washers, environmental services, and industrial waste management. Parts washers are machines used to remove dirt, grime, oil and other waste from various parts and equipment, such as, for example, gears, nuts and bolts, tools, wheel bearings and engine components. The dirt and grease are removed by washing the part in a cleaning solvent in the parts washer. A typical use would be in an automotive repair shop, where a mechanic removes a part from a vehicle and washes it in the parts washer to remove the oil and dirt, before inspecting it and determining whether to repair or replace it. There are a multitude of items that can be cleaned in parts washer and a multitude of reasons for doing so. Safety-Kleen sells or leases parts washers to customers and contracts with the customer to service them. Safety-Kleen also services parts washers owned by its customers or leased by them from other sources.

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[4] IWC Order No. 7-2001, § 3(K): "The provisions of this section [overtime] are not applicable to employees whose hours of service are regulated by:

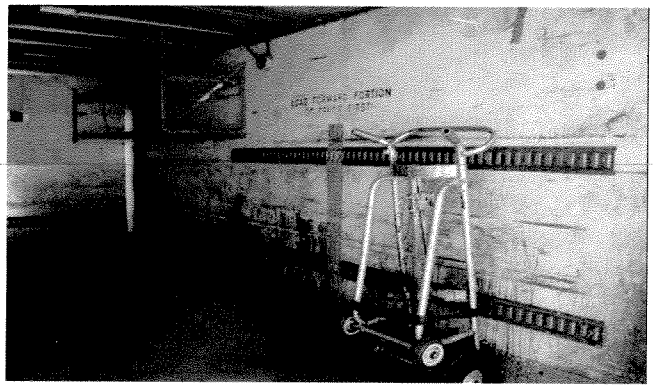
(1) The United States Department of Transportation Code of Federal Regulations, Title 49, Sections 395.1 to 395.13, Hours of Service of Drivers; or

(2) Title 13 of the California Code of Regulations, subchapter 6.5, Section 1200 and the following sections, regulating hours of drivers."

[5] This recitation of facts is supported by the Declaration of Billy R. Ross in Support of Motion for Summary Judgment/Partial Summary Judgment, filed herewith, except where otherwise specifically indicated.

Parts washers must be periodically serviced by removing used cleaning solvent and replacing it with fresh. That is done by Safety-Kleen's CSR's. CSR's are also responsible for maintaining and increasing Safety-Kleen's customer base by placing additional parts washers and selling additional service contracts and other Safety-Kleen products and services.

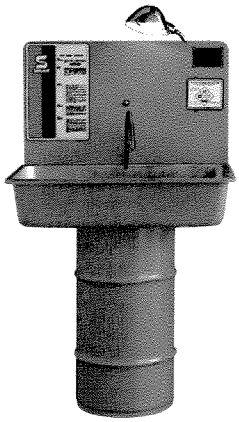
CSR's drive trucks, like those pictured in the following three exterior and one interior photographs.[6]



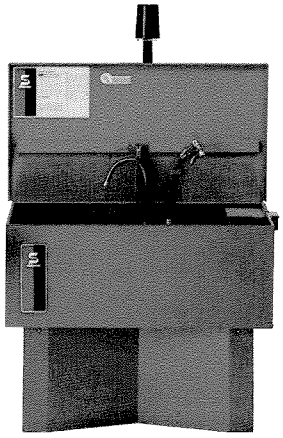
Each CSR has a territory. A CSR starts the day at the CSR's branch. There are thirteen branches in California. Wamboldt worked at the El Monte branch in the Los Angeles area. After doing their paperwork, CSR's drive their trucks, loaded with 5, 16 and 30-gallon drums of fresh cleaning solvent, additional parts washers and other Safety-Kleen products, to their customers. CSR's visit a range of from three to fifteen customers per day. At the customer's,

[6] Pictures are in color if viewed on screen or if a color printer is used.

they remove the used cleaning solvent from the customer's parts washers and replace it with fresh solvent. This is accomplished by switching out the drum of used solvent with a drum of fresh solvent on the "sink-on-a-drum" parts washer or by pumping out the used solvent into an empty waste drum on a tank or vat type parts washers and then pumping fresh solvent into the parts washer.



Sink-on-a-Drum parts washer



Tank or vat type parts washer [7]

The CSR then loads the drums of used solvent onto the truck. At the end of the day, they return to their branches with the drums of used cleaning solvent collected throughout the day.

Mr. Wamboldt testified at his deposition that he drove approximately 40 miles each day and that, with traffic in the El Monte (Los Angeles) area, that amounted to about "two and a half hours" each workday "behind the wheel." Wamboldt Deposition, tr. 230:13 – 231:9-20.[8]

CSR's transport hazardous materials. In California, Safety-Kleen uses several parts washer cleaning solvents that are not classified as hazardous, but there are important exceptions. Two exceptions are AquaWorks® MM-SPRAY HD Concentrate "CORROSIVE LIQUID, BASIC, INORGANIC, N.O.S. (Contains Potassium Hydroxide), 8, UN 3266, III," and AquaWorks® MM-DIP Concentrate "CORROSIVE LIQUID, BASIC, INORGANIC, N.O.S. (Contains Potassium Hydroxide), 8, UN3266, III." They are both listed on the Department of

[7] These are just two examples of parts washers. There are many different kinds.

[8] Attached as Exhibit B to Declaration of attorney Robert W. Tollen, filed herewith.

Transportation's Table of Hazardous Materials, 49 CFR § 172.101,[9] p. 177, as "Corrosive liquid, basic, inorganic, N.O.S., 8, UN 3266, III." Attached as Exhibits A and B to the Ross Declaration are the manufacturer's Material Safety Data Sheet (or "MSDS") for each of those two materials. The MSDSs are required by the Occupational Safety and Health (OSHA) and are in a format prescribed by that agency. Section 14 shows the information conforming to the Department of Transportation's Hazardous Materials Table. As described in Section 3, those two materials can be harmful to the respiratory track (sore throat, coughing, shortness of breath and/or mucous membrane burns), eyes (irritation, redness, pain, blurred vision, burns and/or damage), skin (irritation, redness, pain, blistering, and/or burns), and ingestion (painful swallowing, nausea, vomiting, stomach pains, mouth-throat-gastrointestinal burns, lung injury and/or death). Although many parts washers in California use non-hazardous cleaning solvents, some use these two hazardous cleaning solvents. Regardless of the needs of a CSR's daily scheduled customers, every CSR in California normally carries at least one extra 30-gallon drum of MM-SPRAY and one or more two-gallon jugs of MM-DIP in order to be ready to satisfy unscheduled needs of existing or potential new customers.[10] Mr. Wamboldt also normally carried other hazardous materials on his route from branch to customers, including hazardous Parts Washer 105 Solvent and hazardous paint thinner.[11] Mr. Wamboldt acknowledged at his deposition that Department of Transportation regulations "include, as hazardous material, the very solvents that [he] handled on a daily basis driving [his] truck for Safety-Kleen."[12]

Safety-Kleen also provides industrial waste management services. This industrial waste includes DOT regulated corrosive, toxic, and flammable materials such as dry cleaning solvent (perchloroethylene), chrome plating waste, brake cleaning solution (corrosive liquids), paint thinners (methyl ethyl ketone and toluene), and petroleum distillates. The industrial waste is

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[9] Appendix A, filed herewith.

[10] In addition to the Declaration of Billy R. Ross, *see also* the Declaration of Johnny Jimenez and the Declaration Kevin Preson, submitted herewith.

[11] Declaration of Johnny Jimenez and the Declaration Kevin Preson, submitted herewith.

[12] Wamboldt Deposition, p. 168:15-25, Exhibit B to the Declaration of attorney Robert W. Tollen, filed herewith.

placed by the customer into DOT approved shipping containers such as 55-gallon steel drums and 5-gallon plastic containers. This industrial waste is transported by the CSR from the customer's place of business back to the branch. Much of this industrial waste is recognized as a hazardous material by DOT and by the U.S. Environmental Protection Agency. This hazardous material must be shipped on a uniform hazardous waste manifest and the proper DOT shipping name must be used to describe the hazardous material. The DOT shipping name for a hazardous material is determined by using the information contained in 49 CFR § 172.101, the Hazardous Materials Table.

Safety-Kleen does not maintain readily retrievable data on materials transported from the branch to the customers, but it does maintain such data on materials transported from customers to the branch. The system can retrieve every single shipment of material that each CSR transported from a customer to the branch each day and can identify whether each such material is classified as hazardous by the U.S. Department of Transportation.

Mr. Wamboldt was employed by Safety-Kleen from February 25, 2002, through May 25, 2002. He filed his complaint on November 17, 2006. Therefore, the maximum reach of his claim, under a four-year statute of limitations, would be to November 17, 2002.

During the period from November 2002 through May 2005, on 85.7% of his actual working days, Mr. Wamboldt transported hazardous waste from customers back to his branch. See Exhibit C to the Ross Declaration (summary of the number and percentage of Wamboldt's working days when he transported hazardous waste from customers to the branch). See also, Exhibit D to the Ross Declaration (list by date of each shipment of hazardous waste). On Ross Exhibit D, the hazardous material designations of each shipment are shown in columns G, H and I. They correspond to columns 2 through 6 on the Department of Transportation's Table of Hazardous Materials (206 pages).[13] The Ross declaration also attaches, as Exhibit E, four

[13] 49 CFR § 172.101, a copy is filed herewith as Appendix A for the court's convenience.

representative manifests signed by Mr. Wamboldt. They are offered as illustrations of the source of the data recorded on Exhibit D.[14]

B. LAW

1. Overtime Regulation

Prior to January 1, 2000, overtime under California law was regulated exclusively by the Industrial Welfare Commission (hereafter "IWC"), a semi-legislative body authorized by statute to issue regulations or orders governing wages, hours and working conditions. Labor Code §§ 1171, 1173, 1178, 1178.5, 1182. Pursuant to that authority, the IWC had, for a number of years, promulgated orders requiring premium pay for daily (over 8 hours) and weekly (over 40 hours) overtime. *See generally, Collins v. Overnight Transportation,* 105 Cal.App.4th 171 (2003).

In 1997, the IWC repealed its daily overtime requirements. In response, the Legislature entered the field for the first time by enacting the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, Stats 1999 ch. 134 (AB 60), effective January 1, 2000 (referred to herein as "AB 60"). A copy of AB 60 is filed herewith as Appendix B. As a result of AB 60, certain employment standards were fixed by statute, and the balance, as before, remained subject to regulation by the IWC.

AB 60 created current Labor Code § 510. It requires daily and weekly overtime.[15] Under AB 60, the IWC was directed to continue to issue regulations or orders, as it had before enactment of AB 60, except that its actions were subject to the new statutory provisions.[16] The IWC has continued to do so, and its orders incorporate the statutory requirements of section 510 and other mandatory statutory provisions.

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[14] We have redacted the names of the customers and their addresses for purposes of trade secret confidentiality. Non-redacted copies can be presented *in camera* if the Court so wishes.

[15] The primary, but not exclusive, purpose of AB 60 was to restore *daily* overtime. From the effective date of the IWC's 1997 action to the effective date of AB 60, i.e., the calendar years 1998 and 1999, California had no daily overtime requirement.

[16] During the first six months of 2000, the IWC was directed and authorized to issue orders without first convening wage boards, as otherwise required by Labor Code § 1178. *See* Labor Code §§ 515(a), 517(a).

2. Motor Carrier Safety Exception

AB 60 also authorized the IWC to retain any exemption contained in its wage orders in effect in 1997. Labor Code § 515(b)(2). One of those exceptions or exemptions (here invoked by Safety-Kleen) presently appears as section 3(K) of Industrial Welfare Commission Order No. 7-2001 (Mercantile Industry). *See* full text set forth in footnote 4, *supra.*[17] California's overtime requirements are not applicable to employees whose hours of service are regulated by either of the two referenced sets of motor carrier safety regulations, i.e., 49 U.S.C. §§ 395.1 to 395.13 *or* 13 CCR §§ 1200 *et seq*. *See also, Collins, supra.*

3. California Motor Carrier Safety Regulation

The hours of service of Safety-Kleen's CSR's are regulated by 13 California Code of Regulations ("CCR") §§ 1200 et seq, because all CSR's, specifically including plaintiff Wamboldt, drive vehicles that transport hazardous materials.

- Section 1200 is the first section of chapter 6.5 (Motor Carrier Safety) of CCR Title 13. The chapter includes sections 1200 through 1293. Section 1200 provides that the motor carrier safety provisions of chapter 6.5 apply to all vehicles listed in Vehicle Code § 34500.
- Vehicle Code § 34500 provides that the department (of the California Highway Patrol[18]) "shall regulate the safe operations of" various vehicles including "(g) any truck[19] transporting hazardous materials."

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[17] The IWC issues its Orders on broad industry-wide bases, e.g., manufacturing, agriculture, transportation, mercantile, etcetera, and for certain occupations not covered by any industry order. Counsel for Safety-Kleen believes IWC Order No. 7-2001 is the correct Order applicable to Safety-Kleen. It does not matter, for purposes of this motion, because the Orders all contain the same exclusion from overtime. "An identical exemption is contained in 11 other wage orders covering industries that may involve use of motor carriers." *Collins v. Overnite Transportation,* 105 Cal.App.4th 171, 175 (2003). All of the Orders are listed at http://www.dir.ca.gov/iwc/wageorderindustriesprior.htm.

[18] Vehicle Code § 290.

[19] Neither the Vehicle Code nor the regulations defines a "truck," but Vehicle Code § 410 defines a "motortruck" as a "motor vehicle designed, used or maintained primarily for the transportation of property." The vehicles driven by Safety-Kleen CSR's are "motortrucks." If they are "motortrucks," they are also "trucks," since "the general includes the specific." *Egan v. Egan,* 251 Cal.App. 2d 577, 582 (1967).

- Vehicle Code § 353 defines "hazardous material" as "any … material … posing an unreasonable risk to health, safety or property during transportation, as defined by regulations adopted pursuant to [Vehicle Code] Section 2402.7."
- Vehicle Code § 2402.7 authorizes the Commissioner of the California Highway Patrol to adopt the definitions designated by the U.S. Department of Transportation relating to hazardous materials, and the Commissioner has done so. *See* 13 CCR § 1160.3(d), defining "hazardous material" as including materials designated as hazardous under 49 CFR § 172.101.
- Section 172.101 of 49 CFR includes the Hazardous Materials Table (pp. 131 – 337), listing materials designated by the U.S. Department of Transportation as hazardous.[20]
- As noted, Wamboldt transported hazardous materials from his branch to his customers each and every working day, and he transported hazardous waste from his customers to his branch on 85.7% of his actual working days.

Because Wamboldt drove a vehicle covered by 13 CCR ch. 6.5, §§ 1200 *et seq.* (Motor Carrier Safety), he was subject to safety regulations under 13 CCR § 1212.5 (Maximum Driving and On-Duty Time), specifically including subsection (a)(2)(A) (prohibiting a motor carrier[21] from permitting or requiring any driver[22] used by it to drive more than 12 hours following 8 consecutive hours off duty) and subsection (a)(2)(B) (prohibiting a motor carrier from permitting or requiring any driver used by it to drive after having been on duty 15 hours following 8 consecutive hours off duty), and under sections 1212(b)(1) and (2) (adverse and emergency conditions), 1213.1 (placing drivers out-of-service), 1213.2 (automatic on-board recording

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[20] Appendix A, filed herewith.

[21] Defined as "The registered owner, lessee, licensee, … or bailee of any vehicle who operates or directs the operations of any such vehicle on a for-hire or not-for-hire basis." 13 CCR § 1201 (g). Safety-Kleen owned or leased all vehicles driven by its CSR's. Declaration of Johnny Jimenez and the Declaration Kevin Preson, submitted herewith.

[22] Defined as "Any person … who drives any motor vehicle subject to this chapter. 13 CCR § 1201(h). A "motor vehicle" is any "vehicle that is self-propelled." Vehicle Code § 415(a). Safety-Kleen CSR's drive self-propelled vehicles subject to chapter 6.5. Declaration of Johnny Jimenez and the Declaration Kevin Preson, submitted herewith.

devices capable of recording and displaying hours of service, subsecs. (c) and (i)), and 1214 (driving while fatigued, ill, or other).[23]

In sum, Wamboldt's hours of service were regulated by 13 CCR ch. 6.5, §§ 1200 *et seq.* On that basis, he was exempt from California overtime requirements.

4. The Amount Of Driving Time or Mileage Is Not Relevant Unless it is *De Minimis*

Under the exemptions for executive, administrative, and professional exemptions, an employee must be engaged more than half the employee's time in exempt duties to qualify. Labor Code § 515(a), (e); IWC Order No. 7-2001, §§ 1(A)(1)(e), 1(A)(2)(f), 1(A)(3)(b), and 2(N). The Fair Labor Standards Act has a similar (not identical) test for the its executive, administrative and professional exemptions. *See* 29 CFR §§ 541.100(a)(2), 541.200(a)(3), 541.300(a)(2), 541.700 (employee's "primary duty" must be performance of exempt work). There are no similar words or concepts in the IWC's exemption for employees whose hours of service are regulated under either the U.S. Department of Transportation's regulations, 49 CFR §§ 395.1 to 395.13, or under California's Motor Carrier Safety Regulations, 13 CCR §§ 1200 *et seq.*

California's exemption was modeled after the similar motor carrier exemption of the Fair Labor Standards Act (hereafter "FLSA"), 29 U.S.C. §§ 201 *et seq.* *See* FLSA § 13(b)(1), 29 U.S.C. § 213(b)(1). Because California wage laws are patterned on federal statutes, unless "the language or intent of state and federal labor laws substantially differ," *Ramirez v. Yosemite Bottling Company,* 20 Cal.4th 785, 798 (1999), federal cases interpreting the federal statutes may serve as persuasive guidance for interpreting California law. *Building Material & Construction Teamsters Union v. Farrell*, 41 Cal.3d 651, 658 (1986); *Nordquist v. McGraw-Hill Broadcasting*

[23] Appendix C, filed herewith. Counsel for plaintiff cited those same regulations, specifically 13 CCR §1200(s), in their May 9, 2007, Opposition to Safety-Kleen's motion for summary judgment in the related *Perez* case, no. C 05-5338 PJH. *See* pp. 9-10. Counsel argued inconsistently there that their clients were not subject to the Motor Carrier Safety Regulations, but that the section of those regulations that defined "on-duty time," section 1200(s), *was* applicable to them. The reason that counsel's clients were subject to section 1200(s) is that they were subject to the Motor Safety Carrier Regulations, 13 CCR §§ 1200 *et seq.* On that basis, they are exempted from the IWC's overtime regulations.

Co. (1995) 32 Cal.App.4th 555, 562 (1995); *Hernandez v. Mendoza,* 199 Cal.App.3d 721, 726, fn. 1 (1988); *Alcala v. Western Ag Enterprises,* 182 Cal.App.3d 546, 550 (1986); *Bell v. Farmers Insurance Exchange*, 87 Cal.App.4th 805, 817 (2001). That approach is particularly appropriate under the California Motor Carrier Safety Regulations, 13 CCR §§ 1200 *et seq.,* because they are "a parallel set" of regulations to the federal motor carrier regulations. *Collins v. Overnite Transportation,* 105 Cal.App.4th 171, 175 (2003).

The FLSA requires time-and-a-half for time worked in excess of 40 hours per week. FLSA § 7(a), 29 USC § 207(a). FLSA section 13(b)(1), 29 USC § 213(b)(1), exempts "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of Title 49."[24]

Like the safety program authorized by the California Legislature and developed by the Department of the California Highway Patrol, "Congress, as a primary consideration, has preserved intact the safety program which it and the Interstate Commerce Commission[25] have been developing for motor carriers." *Levinson v. Spector Motor Service,* 330 U.S. 649, 661 (1947). "To do this, Congress has prohibited the overlapping of the jurisdiction of the … Wage and Hour Division, United States Department of Labor, with that of the Interstate Commerce Commission as to maximum hours of service." *Ibid.* "Such overlapping … has not been authorized by Congress and it remains for [the courts] to give full effect to the safety program to which Congress has attached primary importance, even to the corresponding exclusion by Congress of certain employees from the overtime pay provisions of the [FLSA]." *Ibid.,* at 661-662.

Like exemptions under California law, *Ramirez v. Yosemite Bottling Company, supra,* 20 Cal.4th at 794, exemptions under the FLSA are to be narrowly construed. *Phillips, Inc.*, v.

[24] The FLSA merely requires that the Secretary of Transportation have "power" to regulate; the Secretary's actual exercise of the power is not required. Under the IWC's exemption, the employee must actually *be* regulated. That difference is not relevant here, because Safety-Kleen's California CSR's, including Wamboldt, are actually regulated under the applicable regulations.

[25] Predecessor to the Secretary of Transportation.

Walling, 324 U.S. 490, 493 (1945). That principle does *not* apply when narrowly construing the exemption would also narrowly construe the jurisdiction of the agencies administering the motor carrier safety programs:

> … [B]y virtue of the unique provisions of § 13(b)(1) of the [FLSA], we are *not* dealing with an exception to that Act which is to be measured by regulations which Congress has authorized to be made by the Administrator of the Wage and Hour Division, United States Department of Labor. Instead, we are dealing here with the interpretation of the scope of the safety program of the Interstate Commerce Commission.... Congress, in the [FLSA], does not attempt to impinge upon the scope of the [ICC] safety program. It accepts that program as expressive of a … congressionally approved project. Section 13(b)(1) … thus requires that we interpret the scope of § 204 of the Motor Carrier Act in accordance with the purposes of the Motor Carrier Act and the regulations issued pursuant to it. *It is only to the extent that the [ICC] does not have power to establish qualifications and maximum hours of service pursuant to said § 204, that the ... [FLSA] has been made applicable* or its Administrator has been given congressional authority to act. *This interpretation puts safety first*, as did Congress. It limits the Administrator's authority to those employees of motor carriers whose activities do not affect the safety of operation.... *[W]e should approach the issue ... squarely from the point of view of the safety program ... apart from the [FLSA].*

Levinson v. Spector Motors, 330 U.S. 649, 676-677 (1947) (emphasis added).

> *It is the character of the activities rather than the proportion of* either *the employee's time* or of his activities that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment.

Ibid., at 674-675 (emphasis added); *Morris v. McComb,* 332 U.S. 422, 431-432 (1947).

> This line of reasoning … keeps within the jurisdiction of the Commission's safety program [classes of employees and work], provided only that the class or work … affects safety of operation, *regardless of whether or not in any particular week they have devoted more hours and days to activities not affecting safety of operation* than they may have devoted to those affecting such safety of operation.

Levinson, supra, at 675 (emphasis added).

> [A]n employee who is engaged in a class of work that affects safety of operation is *not necessarily engaged during every hour or every day* in activities that directly affect safety of operation. While the work of a full-duty driver may affect safety of operations during only that part of the time while he is driving, yet,

> as a practical matter, it is essential to establish reasonable requirements with respect to his qualifications and activities at all times in order that the safety of operation of his truck may be protected during those particular hours or days when, in the course of his duties as its driver, he does the particular acts that directly affect the safety of operations."

Ibid. at 675-676 (emphasis added).

> [If the employee is] called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities …, he comes within the exemption *in all workweeks when he is employed at such job…. [T]he rule applies regardless of the proportion of the employee's time or his activities which is actually devoted to such safety-affecting work* in the particular workweek, and the exemption will be applicable in a workweek when the employee happens to perform no work directly affecting safety of operation.

29 CFR § 782.2(b)(3) (emphasis added); *Kerr v. Jeans,* 193 F.2d 572, 573 (5th Cir. 1952). The exemption is inapplicable only where "such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis." 29 CFR § 782.2(b)(3).

> A "driver" … is an individual who drives a motor vehicle in transportation…. This definition does not require that the individual be engaged in such work at all times…. *Drivers … include … such partial duty drivers as … "driver-salesmen" who devote much of their time to selling goods rather than to activities affecting such safety of operation.*

29 CFR § 782.3(a) (emphasis added).

In *Kerr v. Jeans,* cited above, the plaintiff argued that, if the employer's contention were true, "any employer who wished to defeat the purpose of the [FLSA] need only send a truck with his employees to work in some type of safety of operations a few times each year … and thus defeat the purpose of [the FLSA]." 193 F.2d at 574. "That same argument [however] was unsuccessfully employed in *Morris v. McComb,* [332 U.S. 422 (1947)]." *Id. Morris v. McComb* held that the motor carrier exemption applied to drivers with respect to whom "only about 4% of their time and effort [was] devoted to services in interstate commerce." 332 U.S. at 431. Moreover, the exemption applied to the entire pool of 37 to 43 such drivers, notwithstanding that the "interstate commerce trips were distributed generally throughout the year and their

performance was shared indiscriminately by the drivers and was mingled with the performance of other … services rendered by them [not] in interstate commerce," so that only 9 out of 37 drivers made one or more such trips each week, most drivers made one such trip "*throughout the year,*" and two never made such trips. *Ibid.*, at 433-434.

The federal regulations "establish a unique regulatory scheme regulating the driving hours of truck drivers, which is designed to balance safety considerations against the demands of the trucking industry." *Collins v. Overnight Transportation, supra,* 105 Cal.App.4th at 175. "They exist under statutory authority for the regulation of motor vehicle safety." *Id.* "Those motor carrier employees, whose hours of service are regulated by this set of safety standards, have always been exempted from the coverage of the federal [FLSA]." *Id.* California's Motor Carrier Safety Regulations at 13 CCR §§ 1200 *et seq.*, are "a parallel set of California regulations." *Id.*

5. Conclusion

Within the realm of *intrastate* commerce, the Department of the California Highway Patrol regulates the hours of service of drivers in the same manner as the U.S. Secretary of Transportation regulates the hours of service of drivers in *interstate* commerce. Just as Congress provided for the FLSA to give way to the jurisdiction of the ICC (now Transportation Department) under the Motor Carrier Act, the California IWC provided for California's overtime regulations to give way to the safety jurisdiction of both the U.S. Department of Transportation and the Department of the California Highway Patrol. Mr. Wamboldt's two and a half hours of driving each day were not *de minimis.* He was subject to the jurisdiction of the Department of the California Highway Patrol. California's overtime requirements were inapplicable to him.

III. MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S COMMISSION CLAIM

A. FACTS

Plaintiff Wamboldt challenges Safety-Kleen's 2004 Customer Service Representative Compensation Plan. Counsel for Wamboldt identified the specific plan in a letter dated December 20, 2006, addressed to counsel for Safety-Kleen. The letter attached a copy of the

plan. A copy of the letter and the plan are attached as Exhibit A to the Declaration of Attorney Robert W. Tollen, filed herewith. The plan sets forth 9 steps. Counsel for Wamboldt flagged the supposedly unlawful steps, numbers 3 and 4 on page 2. Further discussion herein regarding the content of the plan are based on the Declaration of David Eckelbarger In Support of Motion for Summary Judgment/Partial Summary Judgment, filed herewith.

The plan described four separate methods by which CSR's earned additional compensation – or "variable payout" – beyond their salaries in 2004. The first variable payout, described in the first four steps, is the only one that is at issue. Steps 5, 6 and 7 described three separate variable payouts, none of which is at issue. Step 8 totaled the four variable payouts. Step 9 totaled the salary plus the total variable payout. All variable payouts were based on stand-alone, non-cumulative four-week periods. Most Safety-Kleen financial administration is based on such four-week periods.

Measuring a CSR's contribution to revenue is an inexact science. One problem is that most of the sales a CSR brings into the company in one four-week period represent selling efforts that took place before that four-week period, possibly long before. It can also often represent selling efforts of the current CSR's predecessors. In addition to CSRs, Safety-Kleen employs Sales Associates, who bear a greater responsibility than CSR's for selling services and products. For all of these reasons, Safety-Kleen has frequently changed its variable compensation formula, always trying to find the best way to relate variable compensation to a CSR's contribution. The company did the same for its Sales Associates.

Under the 2004 plan, the first variable payout was determined pursuant to the first four steps, each designed to affect a behavior:

First, CSR's earned "hurdle points." Hurdle points were based on a CSR's sales revenue in a four-week period. Sales revenue consisted of (1) revenue received in that period for servicing (cleaning, refreshing and replenishing) parts washers, (2) revenue received for containerizing and removing waste, and (3) revenue received for product sales. It takes less effort to sell services and products to industrial users than to commercial users, because more sales can be made at one industrial location than at one commercial location. For that reason,

seven-tenths (.7) of a hurdle point was credited for each dollar of industrial sales, and a full hurdle point was credited for each dollar of commercial sales. A full hurdle point was credited for each dollar of product sales.

Second, hurdle points were multiplied by a factor that increased as sales revenue increased. Like the allocation of hurdle points, this factor was designed to encourage CSR's to do what they could to maintain or increase sales revenue.

Third, aside from sales revenue, Safety-Kleen wanted to encourage placements. A "placement" was physically placing a piece of equipment, like a parts washer, with a customer. Parts washers normally remain Safety-Kleen property, but the customer signs a service contract. Safety-Kleen's revenue comes from the customer's periodic payments under the service contract. In addition to compensating CSR's for that revenue down the road, Safety-Kleen wanted to provide immediate variable compensation for placements. Therefore, hurdle points were multiplied by a factor that increased as the number of placements increased.

The multipliers for volume of sales and for placements were accomplished in one step. See the chart under Step 1. For example, assume a CSR had been assigned 52,500 hurdle points and had eight placements. The 52,500 hurdle points would place the CSR in the row for 51,251 to 55,00 hurdle points, and the 8 placements would place the CSR in the column for 7+ placements. The figure at that intersection is 5.50%. It meant that the CSR's hurdle points would be multiplied by .055 (52,500 x .055 = 2887.5).

Fourth, Safety-Kleen wanted to encourage cooperation among CSRs and between CSRs and sales associates at a branch. Each of them contributed to the branch's overall revenue. Safety-Kleen wanted a way to recognize their collective contributions. Each branch was assigned a four-week revenue budget or goal. The number resulting from step 2 was multiplied by a factor that varied in accordance with the extent to which the branch met its goal. That calculation is set forth in the table opposite Steps 3 and 4 on page 2. It produces the amount of the first variable payout. Sales Associates' variable compensation in that year had a similar component.

The revenue referred to in steps 3 and 4 of the plan consisted of Safety-Kleen's fees or charges billed to customers during the four-week period. Safety-Kleen charged customers with payment of money in return for parts cleaner services, vacuum services, containerized waste management services, dry cleaning services, equipment sales, allied product sales, project management fees, etcetera. The company submitted bills to its customers for the payment of those charges. Instead of referring to "revenue" in steps 3 and 4 of the 2004 compensation plan, it might have been more accurate to have referred to "billed" or "anticipated revenue," because it was based on billings. For CSR compensation under the 2004 plan, budgeted billings were compared to actual billings. That comparison was performed before any adjustment to billings was made to account for bad debt, returns, customer complaints, or anything else. Thus, those adjustments did not enter into the calculation for CSR compensation. As well, no expense of any kind was taken into account. Profitability, being a product of revenue and expenses, was also not taken into account. Steps 3 and 4 of the plan were based strictly on a comparison of actual billings to customers to budgeted billings to customers.

The year 2004 was the only year Safety-Kleen used a factor of branch revenue performance compared to branch revenue budget as a factor in setting CSR commissions.

B. LAW

The First Amended Complaint alleges that plaintiffs' commissions were reduced by the "profitability of the branch." ¶¶ 10, 16, 17, 22(e), and 37. Paragraph 12 alleges that commission were reduced "to meet certain revenue goals." Plaintiff's Notice of Motion to Amend Complaint; Points and Authorities,[26] p. 4:24, recites that "Safety-Kleen failed to pay … the full amount of commissions due by reducing commissions earned and payable … so as to compensate Safety-Kleen for failure of the branch to meet certain revenue goals." It further recites, p. 5:1-6, that "[t]he California Labor Code also does not permit employees to take deductions from employees for cash shortages experienced by the employer," citing "8 Cal.C.

[26] Filed herein on March 13, 2007.

Regs. § 11010 et seq. ¶ 8."[27] The citation is not to the Labor Code. It is to the Orders of the IWC, which are published in the California Code of Regulations. Section 8 of the IWC's Orders reads in full:

> Cash Shortage and Breakage
>
> No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee.

The IWC's Statements As To The Basis discuss the reasons for its Orders. The Statement As To The Basis for Order No. 7-80 (Revised) recites with regard to section 8 (as do all the statements as to basis):[28]

> Some prohibition against deductions from pay for shortage or breakage has existed in IWC Orders since 1920. It is apparent that the employee's welfare financially would be involved and his or her employment possibly would be at stake if the employee could be charged for shortages without the protection of this section.
>
> It is the IWC's intent that the employer can only deduct for cash shortages or breakages if they are caused by the dishonest or willful act or gross negligence of the employee.

Safety-Kleen's commission compensation plan took branch revenue into account. The IWC's wage orders do not prohibit taking revenue into account. They prohibit "use of certain *expenses* in determining wages due an employee." *Ralphs Grocery Company v. Superior Court*, 112 Cal.App.4th 1090, 1101 (2003) (emphasis added). Since "profitability" is based on "not only revenue but also … expenses," id., the use of profitability is also prohibited, if the expenses that go into it are among the expenses that may not be taken into account.

The complaint in *Ralphs Grocery* was that the company was "basing its incentive compensation, or bonus, on the *net* earnings of a store." 112 Cal.App.4th at 1094 (emphasis on

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[27] The IWC's Orders are published in the California Code of Regulations beginning at 8 CCR §§ 11010 et seq. They may more easily be accessed at the IWC's web site: http://www.dir.ca.gov/IWC/iwc.html. Counsel for Safety-Kleen believe the correct Order is No. 7-2001, 8 CCR § 11070, but it makes no difference which Order is applicable, because they all contain the same language.

[28] Previously submitted as Appendix 22 to Opposition to Motion to Amend, filed April 10, 2007. A copy is submitted herewith as Appendix D.

net in the original). Net earnings are calculated by subtracting expenses. Safety-Kleen's plan does not take account of expenses, profitability, or net earnings. It is based solely on revenue. No statute, IWC regulation, or reported court case has ever prohibited an employer from taking revenue into account in designing a commission or incentive plan.

In *Ralphs Grocery, supra,* the court noted that there are "persuasive arguments, supported by substantial academic literature, that profit-based compensation plans benefit both employers and employees" and that, "as a matter of economics, calculation of an incentive bonus based on profitability … differs markedly from reducing … wages through prohibited deductions." Nevertheless, the court held, "to the extent [the Legislature or the IWC] has prohibited the use of certain *expenses* in determining wages …, economic reality must yield to regulatory imperative." Id. (emphasis added). Safety-Kleen's commission plan uses no expenses. There is no regulatory imperative to which its economic reality must yield.

The claim in *Ralphs Grocery* was valid because it alleged that Ralphs Grocery's plan was based on profitability, which, in turn, was based on prohibited expenses. "To the extent the bonus calculation includes *expense* items the Legislature or the [IWC] has declared may not be charged to an employee …, such a bonus plan is unlawful." 112 Cal.App.4th at 1094 (emphasis added).

> However, other expense items, *even those beyond the individual manager's direct control*, may lawfully be considered in profit-based bonus programs, which can serve as an effective economic incentive … to maximize company profit by increasing revenue and minimizing expenses. *Because the complaint in this case alleges the bonus plan ... includes deductions for expenses within the first prohibited category*, it states causes of action for unlawful deductions from wages and unlawful business practices.

Id. (emphasis added). The Safety-Kleen plan made no deduction for expenses, neither prohibited expenses nor allowed expenses. Safety-Kleen's management believed in 2004 that basing a CSR's compensation in part on the degree to which his or her branch met its revenue goals would "serve as an effective economic incentive [to the CSR] to maximize company profit by increasing revenue," *id.*, but no part of that incentive was based on expenses that California prohibited an employer from taking into account – or on any expense.

All of the other case law is examined in *Ralphs Grocery*: *Kerr's Catering Service v. Dept. of Industrial Relations,* 57 Cal.2d 319 (1962); *Quillian v. Lion Oil Company*, 96 Cal.App.3d 156 (1979); and *Hudgins v. Nieman Marcus Group, Inc.,* 34 Cal.App.4th 1109 (1995). The sales commission in *Kerr's Catering* was "subject to reduction for any cash and inventory shortages." 112 Cal.App.4th at 1098. The bonus in *Quillian* was based on "merchandise or cash shortages." 112 Cal.App.4th at 1099-1100. Sales associates' commissions in *Hudgins* were subject to reduction for commissions previously paid for unidentified returns in violation of California's prohibition on "deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that result from the employee's simple negligence." 112 Cal.App.4th at 1100-1101; *Hudgins*, 34 Cal.App.4th at 1118.

The above opinions criticize the practice of making deductions for losses "beyond the employees' control," so as to make employees "insurers of the employer's merchandise," *Kerr's Catering*, 57 Cal.2d at 327; *Hudgins*, 34 Cal.App.4th at 1124. Those pronouncements are made in the context of an employer that makes deductions from employee compensation to make up for expenses of the business. The *Ralphs Grocery* court held non-prohibited expenses, "even those beyond the individual manager's control, may lawfully be considered." 112 Cal.App.4th at 1094. The above opinions do not declare it unlawful to base commission or incentive pay on the combined efforts of two or more employees.

Based on its review of the case law, the *Ralphs Grocery* court concluded that, to the extent the bonus calculation in that case included "*expense* items the Legislature or the [IWC] has declared may not be charged to an employee …, such a bonus plan is unlawful." 112 Cal.App.4th at 1094 (emphasis added). Safety-Kleen's commission compensation plan includes no expense item. It is lawful.

DATED: May 30, 2007

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